award the applicant was given five weeks from the receipt of the award to reinstate claimant Nos 3 to 19 failing which the office bearers of the applicant should be made to feel the punitive measures contained in s 56(3) of the Act. In addition the respondent was also advised to consider initiating proceedings for contempt against the officers of the applicant.

Going through the whole proceedings I feel that the conduct of the applicant leaves much to be desired. It has shown a total disregard for the orders of the Industrial Court as well as of this High Court. Such conduct should be deprecated and does not at all deserve to come to this court for assistance.

Finally I would say that the interesting and helpful arguments in this case have covered a very wide area and have involved an abundant citation of authorities. But essentially most of the grounds of the complaint touch upon findings of fact which are within the competence of the Industrial Court. On going through the award, I am satisfied that the Industrial Court in making such award had not acted without or in excess of its jurisdiction and consequently the application for an order of certiorari is dismissed with costs.

Order accordingly.

Solicitors: *TM Varughese & Co; Lobo & Associates.*

Reported by *Zarinah Marican*

Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 31-182-88
ABDUL MALEK J
28 AUGUST 1989

Banking — Charges — Enforceability of — Interest payable as of right — Conclusiveness of balance due as provided in agreement — Stamp duty on charge — Civil Law Act 1956, s 11 — National Land Code 1965, s 294 — Stamp Ordinance 1949, s 14

Civil Procedure — Leave to intervene — Stay of execution — Whether appellants would be irremediably injured and appeal rendered nugatory — Circumstances of the parties

Land Law — Registered prior charge — Indefeasibility of prior registration — National Land Code 1965, ss 294 & 340

The defendants were registered proprietors of particular pieces of land and had executed three separate charges over the said pieces of land in favour of the plaintiff as consideration and security for banking facilities of $3.5m granted to the first defendant by the plaintiff. The charges were registered in May 1983, February 1988 and April 1988. The defendants committed a breach of the terms of the charges and the plaintiff brought proceedings for the sale of the said pieces of land.

There was also an application by a third party to intervene in the matter. She alleged that she bought the piece of land charged by the third and fourth defendants on 29 September 1987 and had built a house on it, thereby enhancing the value of the property to the benefit of the plaintiff. As the third defendant had failed to appear and an order had been made against him, she applied for leave to intervene.

The first, second and fourth defendants contended that (1) the charges were unenforceable as the principal sums and rate of interest had not been itemized; (2) the interest rate should be categorized into three stages and s 11 of the Civil Law Act 1956 applied to one category only and it disallowed compound interest; and (3) the stamp duty was underpaid and the documents should be impounded.

Held, granting the plaintiff's application but ordering a stay of execution pending appeal:

(1) Clause 1 of the three charges states that the statement of the manager or any other officer of the chargee as to the amount of balance due shall be final and conclusive. The parties are bound to accept the statement of conclusive evidence of the debt due.

(2) Section 11 of the Civil Law Act 1956 does not apply to debts where interest is payable as of right whether by virtue of an agreement or otherwise, as in the present case.

(3) Section 14 of the Stamp Ordinance 1949 provides that when interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable if no mention of interest had been made therein. Further, once documents have been passed by the registering authority as fit for registration, it cannot at a late stage be impeached on the ground that they were not sufficiently stamped at the time of registration.

(4) As the intervener's interest was acquired some four years after the registration of the charge on the land, the National Land Code provides that a registered interest is an indefeasible title unless there had been allegation of fraud or misrepresentation to which the chargee was privy.

(5) If a stay of execution is not granted the defendants and intervener would be irremediably injured or their appeals rendered nugatory should they be successful. Although the authorities state that this does not amount to special circumstances, the plaintiffs would not be prejudiced by the delayed execution in the circumstances.

Cases referred to

1 *Dobbs* v *The National Bank of Australasia Ltd* (1935) 53 CLR 643 (folld)
2 *Bache & Co (London) Ltd* v *Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437 (folld)
3 *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (folld)
4 *Lall Singh* v *Parmanand* [1941] MLJ 176 (folld)
5 *Cheah Theam Swee & Anor* v *Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426 (distd)
6 *Bank Bumiputra Malaysia Bhd* v *Mahmud bin Hj Mohamed Din* [1989] 1 MLJ 381 (refd)

Legislation referred to

Civil Law Act 1956 s 11
National Land Code 1965 ss 294, 340
Stamp Ordinance 1949 s 14

Ong Geok Lan (Ms) for the plaintiffs.
Hira Singh for the first, second and fourth defendants and intervener.

Cur Adv Vult

Abdul Malek J: The plaintiff had filed this originating summons against all four defendants on 26 February 1988. In their supporting affidavit, the branch manager of the plaintiff had averred that the first defendant is the registered proprietor of 78 pieces of land, the second defendant the registered proprietor of 24 pieces of land and the third and fourth defendants the registered co-proprietors of one piece of land. Details of all 103 pieces of land had been accordingly furnished in the schedules to the affidavit.

The plaintiff's branch manager had further stated that as consideration and security for total banking facilities of $3.5m granted to the first defendant by the plaintiff, the defendants had executed three separate charges over the respective pieces of land respectively registered on 26 May 1983, 25 February 1988 and 23 April 1988. Subsequently, the defendants had committed a breach of the terms of the respective charges governing them and the plaintiff's solicitors had sent the letters of demand by registered post to the four defendants dated 16 December 1987, 24 December 1987, 16 December 1987 and 16 December 1987 respectively. Form 16D notices dated 22 January 1988 were subsequently issued against all four defendants by registered post.

When the matter was called on 26 June 1989, the third defendant and his counsel were absent and as the supplementary affidavit as regards the required particulars of the accounts between the chargors and the chargee had been accordingly filed, I granted the order in terms of the application against the third defendant and fixed the auction date on 28 October 1989.

The application against the other three defendants was adjourned to 29 June 1989 to enable learned counsel for the plaintiff to check on points raised by counsel for the defendants and for the court to also consider the application of Loh Ah Kiew (hereinafter 'LAK') to intervene in the matter. LAK had filed an affidavit stating that she had bought the piece of land charged by the third and fourth defendants to the plaintiff on 29 September 1987 and had built a house on it which had enhanced the value of the property to the benefit of the plaintiff. In view of the order made against the third defendant, she had asked for leave to intervene to protect her interests.

Learned counsel for the first, second and fourth defendants had argued that the charges were unenforceable as the principal sums and interest rates had not been itemised. As for the rate of interest, he submitted that it should be categorized into three stages, firstly from the drawn-down date to the cause of action date, then to the judgment date, and finally to the date of realization. He referred to s 11 of the Civil Law Act 1956 and said that the section only applied to the second category and that the proviso disallows compound interest. To my mind, this argument was devoid of merit as proviso (b) to that section had clearly stated that the section does not apply to debts where the interest is payable as of right whether by virtue of an agreement or otherwise. Here, interest had been agreed to by the parties by virtue of the charge annexures and s 11 of the Civil Law Act 1956 certainly is not applicable.

The affidavit of the plaintiff as to the actual amounts owing further strengthens my finding as to its accuracy in view of the similar last paragraph of cl 1 of the three charge annexures which states: '... and the chargor agrees that the statement of the manager/assistant manager/accountant or any other officer of the chargee as to the amount of such balance shall be final and conclusive.' In *Dobbs* v *The National Bank of Australasia Ltd,*[1] it was held that:

> ... a clause in a guarantee given to a bank provided that a certificate signed by the manager of the office at which the principal debtor's account was kept should be conclusive evidence of his indebtedness at a particular date. It was held that the clause was not contrary to public policy as ousting the jurisdiction of the court and was therefore not void and that a certificate given pursuant to that clause was conclusive upon the parties of the amount and existence of the principal debtor's indebtedness.

Lord Denning's view on this as propounded in *Bache & Co (London) Ltd* v *Banque Vernes et Commerciale de Paris SA*[2] was that:

... this commercial practice of inserting conclusive evidence clauses is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted so much so that a notice of default given by a bank or a broker must be honoured.

Raja Azlan Shah CJ (as he then was) in *Citibank NA* v *Ooi Boon Leong & Ors*[3] had accordingly followed the principle enunciated in these two cases by saying that:

In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebteness of the respondents. Clause 19 provides thus: 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.' It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

In the circumstances, the respondents are bound under cl 19 to accept the certificate of indebtedness duly executed by the assistant vice-president of the branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

Consequently, the arguments of learned counsel for the first, second and fourth defendants must be rejected on this point.

His second point was that the plaintiff should have stamped the charges in respect of the moneys advanced more than the amounts previously stamped. As stamp duty was underpaid, he argued that the charge documents should be impounded until the stamp duty is fully paid up. On this issue, its logical explanation had in fact been enunciated as long about 50 years ago in *Lall Singh* v *Parmanand*[4] where it was held, also on the allegation of insufficient stamp duty, that 'having been passed by the registering authority as fit for registration, it cannot at this late stage be impeached on the ground that it was not sufficiently stamped at the time of registration'. Section 294 of the National Land Code 1965 also supports the fact that the originals had been properly and sufficiently stamped. In any case, s 14 of the Stamp Ordinance 1949 has provided that 'when interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable if no mention of interest had been made therein'. I would, therefore, consequently hold that this argument cannot hold water.

Having held that both the issues raised by counsel for the first, second and fourth defendants are not sustainable, I accordingly granted an order in terms of the plaintiff's application and fixed the auction date, as in the case of third defendant, on 28 October 1989.

On the second date of hearing, learned counsel for the plaintiff had objected to the affidavit of the intervener being considered as learned counsel for the first, second and fourth defendants, who was also counsel for the intervener, had completed his submissions on the previous hearing date. The case quoted by her, namely, *Cheah Theam Swee & Anor* v *Overseas Union Bank Ltd & Ors*[5] is, to my mind, distinguishable as here there are two applications and I had yet to hear submissions on the intervener's application. Counsel for the first, second and fourth defendants had submitted only as regards the defendants' application at the earlier hearing and this was the only affidavit deposed by the intervener. In this circumstances, I had overruled her submissions on this point.

As for the intervener's application, as stated earlier, I had allowed her affidavit to be put in and held that it is not disputed that she had bought the property belonging to the third and fourth defendants, the latter being her husband, on 29 September 1987. The relevant charge of the property by the third and fourth defendants to the plaintiff was registered on 23 April 1983.

It is interesting to note that in another suit heard in this court, namely, *Bank Bumiputra Malaysia Bhd* v *Mahmud bin Hj Mohamed Din*,[6] the same counsel for this intervener had represented another intervener in similar circumstances. However, in that case, the intervener had bought the property three years before the charge. The court had held, on that intervener's claim of priority over the charge, that the registered chargee, despite being later in time, had a registered interest and an indefeasible title against the world under s 340 of the National Land Code 1965 unless there had been allegations of fraud or misprepresentation and the like to which the chargee was party or privy. In our case, the chargee's case is so much stronger as the charge had been registered four years before the sale and purchase. I had therefore dismissed the application with costs.

In passing it is relevant to note that counsel for the first, second and the fourth defendants had submitted that two of the properties charged had been redeemed and as such the court could not grant an order for sale on the application. However, I had to disregard this objection as there was nothing stated in the affidavits.

The first, second and fourth defendants and the intervener had subsequently filed separate summons-in-chambers for an order that the execution of the judgment against them be stayed pending the disposal of the appeal and after hearing arguments, I was of the view that this was a case where the appellants would be irremediably injured if there was no stay should their appeals succeed. In that event, their appeals would be rendered nugatory. This is of course a matter of discretion and although I had been guided by previous authorities which state that this does not amount to special circumstances, I am of the view that the plaintiff would not be prejudiced by the delayed

execution in the circumstances in the interests of the first, second and fourth defendants and the intervener.

Counsel for the plaintiff had also applied for a postponement as regards the fact that two of the properties had been redeemed after the application, which fact I had disregarded earlier when informed by counsel for the first, second and fourth defendants and the intervener, but since the plaintiff had made a formal application to amend the order for sale, which is now pending, my view was that the orders for stay would also enable them to sort out the situation as regards the other properties charged.

Order accordingly.

Solicitors: *Joseph Tan & Tang; Asbir, Hira Singh & Co.*

Reported by *Yap Shao Sin*

Kandasamy a/l Sreenivasagam v Syarikat Muzwina Development Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22-210-88
ABDUL MALEK J
28 AUGUST 1989

Civil Procedure — Jurisdiction of registrar to hear application for specific performance — Rules of the High Court 1980, O 1 r 4 & O 81

Land Law — Agreement for sale and purchase of property — Liquidated damages to date of possession — Dispute as to date of possession

The plaintiff had agreed to purchase a piece of property from the defendants in April 1985. A sum of $26,000 had been paid towards the purchase price of $42,250 while a sum of $16,000 had been withheld as the plaintiff claimed a right of set-off. Vacant possession was to be delivered to the plaintiff within 24 months of the agreement, failing which liquidated damages, calculated from day to day at 10% pa of the purchase price, was payable immediately to the plaintiff. Water and electricity were put in on 2 February 1989. The plaintiff applied for judgment, contending that his claim was for vacant possession and liquidated damages from 1 April 1987 to 2 February 1989. The defence contended that the plaintiff was not entitled to possession as that was subject to the issue by the defendants' architect of a certificate of completion and the plaintiff having paid all instalments of purchase price and other moneys due. Further, the house was completed on 23 January 1988 and the plaintiff had to pay the amounts due before that and a sum of $15,249.02 was still due from the plaintiff. The period for the liquidated damages should be from 1 April 1987 to 14 days after 23 January 1988. The senior assistant registrar remitted the case to a judge as she agreed with the defence that she had no jurisdiction to decide as it involved specific performance for the sale and purchase of property.

Held, allowing the plaintiff's application:

(1) As the parties have agreed to various matters including the setting off of the liquidated damages from the balance of the purchase price, the only issue was the period of the liquidated damages that was to be calculated. As counsel for the parties left it to the court to decide, the relevant date which liquidated damages should run to was 2 February 1989, the date when water and electricity were installed.

(2) The plaintiff was to pay the balance due to the defendants after setting off the liquidated damages and interest due to the plaintiff as provided under the agreement and the defendants are to provide the keys after payment has been made.

(3) The learned senior assistant registrar may have been in error as applications for specific performance falls under O 81 of the Rules of the High Court 1980 and O 1 r 4(2) provided that the 'Court' means the High Court or any one or more judges thereof, whether sitting in court or in chambers, or the registrar.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-312 of 1989.]

Cases referred to

1 *SEA Housing Corp Sdn Bhd* v *Lee Poh Choo* [1982] 2 MLJ 31 (folld)
2 *Loh Wai Lian* v *SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1 (folld)
3 *Syarikat Lean Hup (Liew Brothers) Sdn Bhd* v *Cheow Chong Thai* [1988] 3 MLJ 221 (folld)

Legislation referred to

Rules of the High Court 1980 O 1 r 4, O 81

Lalchand N Thadani for the plaintiff.
Yap Foo Ken and *Meor Sha'azizi bin Meor Shaari* for the defendants.

Cur Adv Vult

Abdul Malek J: The plaintiff had applied by way of summons-in-chambers filed on 7 January 1989 for an order that the plaintiff be at liberty to enter final judgment against the defendants as per the statement of claim dated 23 November 1988, or such order as may be made in the circumstances, and that the defendants do pay the costs.

Applications like these are normally dealt with by the senior assistant registrar but when the matter came up before her, learned counsel for the defendants had argued that she had no jurisdiction to decide as it involved specific performance for the sale and purchase of property. Despite learned counsel for the plaintiff's submission that this was only an application for vacant possession, the learned senior assistant registrar had agreed with counsel for the defendants and had remitted the case up to me.

The learned senior assistant registrar may have been in error here as applications for specific performance of an agreement fall under O 81 of the Rules of the High Court 1980 where the word 'Court' is used. Order 1 rule 4(2) of the Rules provides that 'Court' means the High Court or any one or more judges thereof, whether sitting in court or in chambers, or the registrar.

The plaintiff had prayed for the following orders in his statement of claim filed on 25 November 1988: